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Office-Supreme Court,
FILED
APR 11 195
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

October Term, 1950

No. 479

RISS & COMPANY, INC., A Corporation, *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal from the United States District Court for the Western District of Missouri.

REPLY BRIEF FOR RISS & COMPANY, INC.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The brief filed by the Interstate Commerce Commission argues that (1) the Administrative Procedure Act is applicable only if Section 207(a) in terms contained the word "hearing"; (2) a hearing on applications for certificates to motor carriers was required prior to 1938, but in that year Congress eliminated by amendment the requirement of a hearing; (3) section 10 of the Administrative Procedure Act does not assure to applicants for certificates of public convenience and necessity a trial *de novo* of the facts in the district courts even though there is no statutory provision for hearing before the Commission, and; (4) the right to operate as a motor carrier in interstate commerce under a certificate of public convenience and necessity is a "privilege" which the Commission may grant or withhold without hearing.

I.

The Commission urges that the phrase "required by statute" in section 5 of the Administrative Procedure Act limits the application of that section to those instances in which explicit statutory words granting a hearing can be pointed out. The Commission points to certain items of legislative history of the Administrative Procedure Act which it urges in support of this construction. (Brief for Commission, pp. 12-16). Precisely the same construction supported by these citations to legislative history was urged in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, and emphatically rejected by this Court, 339 U. S. 33, 48-50. It should be noted that the legislative history is replete with references indicating that the statutory hearing within the meaning of section 5 included not only those instances where the statute referred to a hearing, but also where a hearing was required by necessary construction of the statute.[1]

This argument in the brief of the Commission is all the more surprising since Commissioner Aitchison testified before the Committee on the Judiciary of the House that the draftsman of the Administrative Procedure Act was thinking "probably and naturally" of fights over certificates of public convenience and necessity in drafting the Act. Commissioner Aitchison stated:

> I would like to say this, with reference to the general approach of the bill . . . I think quite probably and naturally the draftsman was thinking of rate contro-

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[1] See *e.g. Administrative Procedure Act, Legislative History*, Sen. Doc. 248, 79th Cong. 2nd Sess. p. 285, n. 9; Statements in the reports of the Committee and on the floor that section 5 applies only where Congress has by some other statute required a hearing do not establish that Congress intended to distinguish between the phrase "required by statute" and "required by law". Similar expressions were used in connection with the phrase "required by law", where it was contained in the Administrative Procedure Act. Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong. 2nd Sess. p. 19; Hearings, Committee on the Judiciary, House of Representatives on Federal Administrative Procedure, p. 30; 92 Cong. Rec. 2155.

versies, or fights over certificates of convenience and necessity or grandfather rights, or possibly he had other agencies of the Government chiefly in mind, and he drafted his bill on the theory that the administrative functions to be dealt with are controversies between the agency and private people, or controversies between private people . . .

Hearings, Committee on the Judiciary, House of Representatives on Federal Administration Procedure, p. 49 (1945).

II.

The Commission further argues that prior to 1938 the Interstate Commerce Act required a hearing on an application for certificates of public convenience and necessity, but that in 1938 Congress eliminated the requirement for hearings in such cases. This argument of the Commission rests upon a construction of the legislative history and a theory never before advanced by the Commission in any case or proceeding prior to this appeal.

The Commission in 1938 made recommendations to Congress for changes in the Motor Carrier Act. Among the recommendations was that Congress empower the Commission to grant to motor carriers operating authorities for a period of 180 days in certain limited circumstances in its discretion and without hearings. The Commission urged that such authority was necessary because the Motor Carrier Act required that a public hearing be held on all applications for certificates of public convenience and necessity. Accordingly, Congress enacted section 210(a) of the Interstate Commerce Act which specifically authorizes the Commission to grant such operating authority for limited periods of time in emergency cases without hearings. The Commission in its brief relying on other statements in these recommendations now claims that Congress wholly eliminated the requirement of hearing in all applications for certificates of public convenience and necessity.

The argument now urged by the Commission is that it recommended and Congress enacted a specific section authorizing the Commission to issue temporary operating au-

thority under specific conditions without hearings, because of the requirement of a hearing in application cases and that the Commission simultaneously recommended and Congress enacted a provision which eliminated any requirement for a hearing on these applications for certificates of public convenience and necessity. This reduces the recommendations of the Commission and the amendments enacted by Congress to nonsense. Why adopt special statutory authority for the issuance of temporary operating authorities without hearings and simultaneously eliminate the requirement for hearings in applications under section 207(a)? The recommendation of the Commission predicated the request for the amendment upon the ground that a hearing was required under section 207(a). Why make such a request if the requirement of a hearing in section 207(a) was also to be eliminated? It should be noted that there was no change by these amendments in the provisions of section 207(a). Clearly such a construction of the legislative history of the Motor Carrier Act would attribute both to Congress and the Commission a wholly irrational purpose and intent.

It is significant that none of the excerpts from the Commission's recommendations quoted in the Commission's brief refer to an elimination of the requirement for a hearing in applications for certificates of public convenience and necessity. Indeed, aside from creating statutory authority for issuing temporary operating authority and temporary approval of operation of facilities by a proposed purchaser without hearings, the recommendations refer only to action under section 213, now repealed, and approval of the issuance of securities. Certainly such a fundamental change as the Commission now claims to have been made, would have called for some specific reference or discussion. Further, the recommendations quoted in the Commission's brief (pp. 22-23) clearly indicate that the amendment to section 205(f) now section 205(e) relating to notice and hearing was designed to take account of the special instances in which the amendments were requested specifically author-

izing action without hearings and in other types of action in which hearing would not otherwise be required.[2]

That an elimination of the necessity for a hearing was never intended or requested by the Commission or enacted by Congress is demonstrated by the testimony of Commissioner Eastman in connection with the Transportation Act of 1940, 54 Stat. 924. The Transportation Act of 1940 made a number of changes in the Interstate Commerce Act. Commissioner Eastman, who had presented the recommendations of the Commission to the House and Senate Committees in 1938, testified again in 1939 that a hearing was required on applications for certificates of public convenience and necessity covering operations of motor carriers. Commissioner Eastman stated to the Senate Committee on Interstate Commerce in 1939:

> Take the rule that certificates shall be given to motor carriers showing proof of public convenience and necessity. That a quasi-legislative work. Congress lays down the rule; the Commission considers the fact of a particular case and applies the rule to these facts. In doing that, the Commission employs judicial procedure. Inherently, however, what it does is legislative. It is acting as an arm of Congress, as a substitute for Congress in a way, but in its procedure, it acts like a court. In other words, it acts as a court for the protection of the public interest, and to prevent arbitrary, unprincipled action. The courts have held that in performing such duties the Commission must hold hearings and must be guided in its action by the record made at these hearings just as a court is. Hearings, Committee on Interstate Commerce of the Senate on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., 812 (1939).

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[2] The Recommendations of the Commission state:

"In view of the amendments above recommended, which would eliminate the necessity for public hearings in certain instances, and in view of the fact that the act in other instances permits, except for this paragraph, action without a public hearing, we recommend that the last part of the paragraph be changed . . ."

It is, therefore, absolutely clear that Commissioner Eastman, who had presented the recommendations of the Commission in 1938, realized that the amendments adopted by Congress had not eliminated the requirement of a hearing on applications for certificates. Moreover, it is also clear that in the twelve year period following the enactment of the amendments in 1938, the Commission adopted and acted upon the construction that the Interstate Commerce Act required a hearing on applications for certificates of public convenience and necessity. The Commission has not once denied a hearing on an application for a certificate of public convenience and necessity and, in fact, has consistently ruled that a full and fair hearing is required under the statute. *Leonard Bros. Transfer & Storage Co., Inc., Extension*, 48 M.C.C. 773; *Greyhound Corp., Extension*, 47 M.C.C. 103; *Texas & P. Motor Transport Co.*, 47 M.C.C. 753; *Somerset Bus Co., Inc., Extension*, 43 M.C.C. 543; *Public Service Interstate Transp. Co.*, 43 M.C.C. 599; *Columbia Motor Transport Co.*, 46 M.C.C. 69, 91; *Falwell Fast Freight, Inc., Extension*, 47 M.C.C. 743; *Calgary-Spokane Exp.*, 29 M.C.C. 746.

This Court has also consistently interpreted the Act as requiring a fair hearing on applications for certificates of public convenience and necessity. *Chicago, St. P., M. & O. R. Co.* v. *United States*, 322 U. S. 1, 4; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515; *American Trucking Associations* v. *United States*, 326 U. S. 77; *United States* v. *Texas & Pacific Motor Transport Co.*, Nos. 38 and 39, October Term, 1950, decided February 26, 1951.

It is, therefore, clear that this novel construction of the statute now advanced by the Commission is completely contrary to the consistent construction placed upon the statute by the Commission and this Court for more than twelve years. In fact, this contention on the part of the Commission is advanced for the first time in the brief filed in this Court in this case.

The effort made in the brief of the Commission despite the prior statements of the Commission to Congress, its own prior decisions and the decisions of this Court to deny the right of motor carriers to hearings points out the extent to which the agency will go to avoid compliance with the standards of adjudication contaned in the Administrative Procedure Act. The Commission failed in its attempt to obtain Congressional exemption from the Administrative Procedure Act, although it earnestly sought such an exemption. *Administrative Procedure Act, Legislative History*, Sen. Doc. 248, 79th Cong., 2d Sess., pp. 87-90. Having failed in this attempt, the Commission apparently hopes to obtain judicial exemption through new, restrictive and erroneous interpretations of the Interstate Commerce Act.

III.

It is urged in the Commission's brief that the effect of section 10 of the Administrative Procedure Act would not be to permit applicants for certificates of public convenience and necessity a trial *de novo* in the district courts even though the applicants were not entitled to a hearing and decision on the record before the Commission. The Commission argues that the statements in the House and Senate Committee reports and by the sponsors of the bill on the floor of the House which clearly state this intent and purpose of section 10 are merely "erroneous". The brief of the Commission overlooks the fact that Commissioner Aitchison testified in connection with the Administrative Procedure Act before the House Judiciary Committee that in cases where there is no record the court can take testimony de novo to inquire whether the order of the Commission is reasonable. Commissioner Aitchison stated in connection with judicial review of Commission cases:

> The court in the case of the Urgent Deficiencies Act does not go into the facts unless the party moving for a review puts the entire record before the court. And

then the court examines for the purpose of seeing whether the well known standards have been met; otherwise, it does not go into the facts.

"Now, with respect to other classes of cases where there is no record, there obviously we have quite a different situation and there seems to be a line of authority that in a case of that sort the court can take testimony de novo, to inquire whether the order of the Commission was a reasonable one.

Hearings, Committee of the Judiciary, House of Representatives on Federal Administrative Procedure, p. 59 (1945).

It is difficult to understand how the Commission in the light of its present argument can contend that there would be a record for review under the well known rule of substantial evidence. Clearly as Commissioner Aitchison points out that without such a review judicial trial *de novo* is required. Section 10 of the Administrative Procedure Act merely confirms these standards depending upon the existence of a statutory hearing and record made before the Commission.

IV.

The claim of the Commission (Brief, pp. 16, 28-31) that outright denial of any hearing upon the application for a certificate of public convenience and necessity would not have been an infringement upon either the statutory or constitutional rights of appellant is unsupportable.

The statutory right of appellant to a hearing in conformity with the provisions of the Interstate Commerce Act and Administrative Procedure Act has been heretofore discussed. The assertion that no hearing at all is necessary because "due process" is not required in the determination of the issues presented is predicated upon reasons not only novel to the point of being revolutionary in legal concept, but is untenable under long settled principles of constitutional interpretation.

The Commission rests its argument on the theory that Congress has the alleged legislative power to refuse licenses or certificates to all motor carriers in interstate commerce and, under the doctrine that the greater power includes the lesser, the setting up of standards under which certificates were to be granted confers no rights bu are merely matters of grace, without constitutional safeguard. The Commission therefore argues that the grant of the privilege being a mere matter of grace with Congress, that it remains so with the Commission when Congress prescribes the standard of public convenience and necessity upon proof of which the Commission was required by the Act to grant certificates to applicants.

Passing without argument—although it is subject to grave question from a constitutional viewpoint—the assumption that Congress could bar all motor vehicles from interstate commerce by simple legislative act—it does not follow from this that, in the absence of judicial review de novo of the facts, "due process" and constitutional safeguards necessitating a fair and impartial hearing in conformity with recognized judicial standards is not required in the exercise by the Commission of the delegated authority. In fact, almost without exception the situations in which "due process" has been held to be a constitutional requirement have been those in which a governmental authority has been engaged in the enforcement or administration of rules of law as applied to the individual. We find no cases heretofore where it has been even contended that because the law making authority possessed plenary power—not yet exercised—in the particular field of action, the constitutional requirement for "due process" in the application of the law as it stands is eliminated.

The Commission entirely overlooks the fact that the same situation existed insofar as Congress is concerned in the *Sung* case (339 U. S. 33). Congress possessed the plenary power to bar entry or require deportation of all aliens, without limitation. *The Japanese Immigrant Case, (Yamataya* v. *Fisher)* 189 U. S. 86, 96. It chose, however, to set

up standards for admission and deportation. In the application of those standards to specific cases the Immigration Service was entrusted with the authority to act under those standards. This court held in the *Sung* case, as it has held in all other cases, where like questions have been involved, that the fundamental constitutional safeguard of "due process" applied to the agency in the administration of the statutory powers. See also: *Bratton* v. *Chandler*, 260 U. S. 110; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *Morgan* v. *United States*, 304 U. S. 1; *Kline* v. *United States*, 41 F. Supp. 577 (D. C. Neb. 1941).

V.

It is the claim of the Commission that, because of "the multitude of small motor carriers" (Brief p. 38), due process in the adjudication of their applications for certificates should not be afforded. It is a novel proposition that because motor carriers are small in comparison with railroads and airlines they are not equally entitled to the fundamental concepts of fair play in their regulation by the Commission. Constitutional rights are not merely for a few, but are equally for all. The right to continue its business is just as important to the smallest motor carrier as it is to the largest railroad, airline, or public utility. Indeed, we believe that if a preferential treatment is to be given, it should go to the small rather than the powerful.

We submit that this Court should reject the attempt to gain a judicial exemption from the Administrative Procedure Act at the expense of motor carriers subject to its regulation.

Respectfully submitted,

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